Public Prosecutor v Tang Kheng Teong & Anor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO P-05-70 OF 1994
SHAIK DAUD, ABDUL MALEK AHMAD AND DENIS ONG JJCA
16 APRIL 1997

Criminal Law *— Dangerous Drugs Act 1952 — Trafficking in dangerous drugs — Evidence of chemist that substance found contained heroin — Whether chemist's evidence ought to be rejected for not having complied with the provisions of the Act*

Criminal Procedure *— Appeal — Right of — Plea of guilty — Whether prosecution could appeal against conviction in a matter where the accused had pleaded guilty to an amended charge — Courts of Judicature Act 1964 ss 3 & 50 — Criminal Procedure Code (FMS Cap 6) ss 303A & 305*

The respondents were charged with trafficking in 1,689.68gm of heroin. The trial judge found that the evidence of the chemist was unsatisfactory and doubted the accuracy of the weight of the heroin analysed and held that the chemist had not complied with the provisions of the Dangerous Drugs Act 1952 ('the Act') in conducting the chemical analysis on the drugs recovered. At the close of the case for the prosecution, the trial judge amended the charge to one under s 12(2) and (3) of the Act punishable under s 39A(2). Both respondents pleaded guilty and the judge meted out sentences of imprisonment and strokes. The appellant appealed. The issues before the court were: (i) whether the evidence of the chemist was correctly rejected; and (ii) whether, in view of s 305 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), the prosecution could appeal against conviction in a matter where the respondents had pleaded guilty to an amended charge.

Held, allowing the appeal and directing that the defence of both respondents be called on the original charge:

(1) It was incorrect for the judge to reject the chemist's evidence for not having complied with the provisions of the Act in conducting the chemical analysis on the drugs recovered. In regard to the evidence of the chemist, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. As long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory. In this case, the judge was in error especially when he had specified the same amount of drugs in the amended charge as that appearing in the original charge, and after having concluded that the prosecution's case was overwhelming and that the drug involved, pursuant to the chemical analysis, was heroin (see pp 642G–H and 643A); *PP v Lam San* [1991] 3 MLJ 426 followed.

(2) The prosecution could appeal against conviction in a matter where the respondents had pleaded guilty to an amended charge even though s 305 of the CPC provides that the appeal should only be against sentence because, in view of s 303A of the CPC, s 305 only applies to proceedings in a sessions court and a magistrate's court. Further, s 50 of the Courts of Judicature Act 1964 ('the CJA') states that the court has jurisdiction to hear and determine any appeal against any decision made by the High Court and 'decision' under s 3 of the CJA includes a judgment, sentence or order. Upon reading the relevant provisions, the court found the argument totally devoid of merit as the decision appealed against was actually the reduction of the charge which certainly was an order, which is appealable, and the plea of guilty by both the respondents to the reduced charge was only a consequence of that order (see p 643C–G).

[Bahasa Malaysia summary

Penentang-penentang dipertuduhkan dengan kesalahan mengedar heroin sebanyak 1,689.68gm. Hakim perbicaraan mendapati bahawa keterangan ahli kimia tidak memuaskan dan meragui ketepatan berat heroin yang dianalisakan dan memutuskan bahawa ahli kimia telah tidak mematuhi peruntukan Akta Dadah Berbahaya 1952 ('Akta tersebut') dalam menjalankan analisa kimia atas dadah yang dijumpai. Di penutup kes pendakwa, hakim perbicaraan meminda pertuduhan kepada pertuduhan di bawah s 12(2) dan (3) Akta tersebut yang boleh dihukum di bawah s 39A(2). Kedua-dua penentang mengaku bersalah dan hakim menjatuhkan hukuman pemenjaraan dan sebatan. Perayu membuat rayuan. Isu-isu di hadapan mahkamah adalah sama ada: (i) keterangan ahli kimia ditolak dengan betulnya; dan (ii) memandangkan s 305 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'), pihak pendakwa boleh merayu terhadap sabitan dalam perkara di mana penentang-penentang telah mengaku bersalah atas pertuduhan terpinda.

Diputuskan, membenarkan rayuan dan mengarahkan bahawa pembelaan kedua-dua penentang-penentang dipanggil atas pertuduhan asal:

(1) Adalah tidak betul untuk hakim menolak keterangan ahli kimia atas alasan ia tidak mematuhi peruntukan Akta tersebut dalam menjalankan analisa kimia ke atas dadah yang dijumpai. Mengenai keterangan ahli kimia, melainkan keterangan adalah begitu sukar dipercayai hinggakan tiada orang yang munasabah boleh percaya ia adalah benar, ia harus diterima sebagai keterangan prima facie. Selagi keterangan boleh dipercayai, tiada keperluan ahli kimia menunjukkan secara terperinci apa yang dilakukan dalam makmalnya. Dalam kes ini, hakim terkhilaf terutamanya apabila beliau menetapkan jumlah dadah yang sama dalam pertuduhan terpinda seperti yang ternyata dalam pertuduhan asal, dan selepas

menyimpulkan bahawa kes pihak pendakwa adalah amat kukuh dan bahawa dadah yang terlibat adalah heroin menurut ahli kimia (lihat ms 642G–H dan 643A); *PP v Lam San* [1991] 3 MLJ 426 diikut.

(2) Pihak pendakwa boleh merayu terhadap sabitan dalam perkara di mana penentang-penentang telah mengaku bersalah atas pertuduhan terpinda walaupun s 305 KAJ memperuntukkan bahawa rayuan haruslah hanya terhadap hukuman kerana memandangkan s 303A KAJ, s 305 cuma terpakai kepada prosiding dalam mahkamah sesyen dan mahkamah majistret. Selanjutnya, s 50 Akta Mahkamah Kehakiman 1964 ('AMK') menyatakan bahawa mahkamah mempunyai bidang kuasa untuk mendengar dan menentukan mana-mana rayuan terhadap mana-mana keputusan yang dibuat oleh Mahkamah Tinggi dan 'keputusan' di bawah s 3 AMK termasuk suatu penghakiman, hukuman atau perintah. Apabila peruntukan yang relevan dibaca, mahkamah mendapati bahawa hujah itu langsung tidak mempunyai merit kerana keputusan yang dirayu sebenarnya adalah pengurangan pertuduhan yang memangnya satu perintah, yang boleh dirayu, dan akuan bersalah oleh kedua-dua penentang terhadap pertuduhan yang dikurangkan hanyalah satu akibat perintah itu (lihat ms 643C–G).]

Notes

For cases on Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 30–233.

For cases on right of appeal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 375–432.

Cases referred to

PP v Ang Soon Huat [1991] 1 MLJ 1 (refd)
PP v Lam San [1991] 3 MLJ 426 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50
Criminal Procedure Code (FMS Cap 6) ss 303A, 305
Dangerous Drugs Act 1952 ss 12(2), (3), 39A(2)

Appeal from: Criminal Trial No 47–1–1991 (High Court, Pulau Pinang)

Zaitun Zawiyah Puteh (Deputy Public Prosecutor) for the appellant.
R Rajasingam (*Ranjit Singh Dhillon* with him) (*R Rajasingam & Co*) for the respondent.

Abdul Malek Ahmad JCA (delivering the judgment of the court): A police party had raided apartment No 46–11–11 Green Lane Heights, Jalan Besi

in Georgetown, Penang at about 6pm on 30 June 1990 after having to break down the front wooden door. The wooden door was behind a metal grilled door which was closed but not locked and the front window louvres were shut. The police had identified themselves when knocking on the front door but, upon getting no response, had kicked it open. They had, however, heard the sound of things being moved inside when they were knocking earlier. From a hole in the door as a result of the kick, they managed to open the door from inside. Inside, they found both the respondents, who were brothers, one in the living room and one in the kitchen, clad only in their underwear with white powder and orange colouring on the tips of their fingers and feet, in a state of shock.

In the apartment, the raiding party found two light green basins containing orange coloured powder in loose form in the kitchen and a yellow coloured basin containing orange coloured powder being heated on a gas stove at the rear balcony. After arresting the respondents, the police party made a search of the apartment. Prior to the search, the first respondent, now handcuffed, had led the police to the only toilet in the apartment where he pointed upwards with his mouth to the water tank. At the top of the tank was discovered a white and light orange coloured plastic bag inside which were four compressed blocks of a white substance each wrapped separately in plastic and brown paper.

Three packets and six small packets of suspected heroin were found in a pail in the third room and in a drawer of the altar in the living area respectively. All the contents of the exhibits recovered, the swabs taken of the hands and feet of the respondents, and the samples of powder gathered from the floors and from the underwear the respondents were wearing, showed traces of heroin which upon chemical analysis amounted to 1,689.68gm of heroin which formed the subject matter of the trafficking charge against them.

At the close of the case for the prosecution, the learned trial judge amended the charge to one under s 12(2) and (3) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39A(2) of the Act.

The amended charge read as follows:

> That you jointly on 30 June 1990 at about 6pm at apartment No 46–11–11 Green Lane Heights, Jalan Besi, in the district of Georgetown, in the state of Penang, did have in your possession a dangerous drug, to wit, 1,689.68gm of heroin, to which Part IV of the Dangerous Drugs Act 1952 applies without being authorized to be in possession of such drug or deemed to be so authorized under the said Act or regulations made thereunder and you have thereby committed an offence under sub-ss (2) and (3) of s 12 and punishable under sub-s (2) of s 39A of the said Act.

Even this, in our view, is not quite correct as sub-s (3) of s 12 of the Act is a punishable section and not the commission section.

Both respondents pleaded guilty. The first respondent was sentenced to 12 years imprisonment and to 12 strokes while the second respondent, being a juvenile, to nine years' imprisonment and to ten strokes. The jail terms were to run from the date of arrest.

A As the learned trial judge explained in his judgment:

> The evidence of being in possession of the heroin found in the apartment in this case was overwhelming against the two accused persons so as to justify their being called to enter upon their defence. They were surprised by the police party and caught in their underwear, literally with their pants down and off. Swabs taken of their hands and feet showed the presence of heroin. The suspected drugs found in their immediate presence when surprised by the police party as well as those recovered from the toilet and other parts of the apartment showed the same to be heroin. There was no one else in the apartment at the time of the raid and there was an inexorable link between them and the heroin recovered.

C However, he appeared to be quite unhappy with the evidence of the chemist. At one point he said:

> In these circumstances, the court had no doubt that the drug exhibits which were analysed did contain heroin but the question was, how much? Again, the court had doubts of the extent to which each bulk of the suspected drug exhibits was homogenized before analysis as it was only in re-examination that the chemist said that he also used a blender besides physically shaking the suspected drug exhibits in a plastic bag to 'harmonize' them. However, even the use of a blender alone, without more, would not assure homogeneity of the bulk in the absence of evidence to show that the process adopted had resulted in the bulk achieving a uniform consistency throughout so as to become homogenous.
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> Bearing the above infirmities in the chemist's evidence in mind, it was open to the court to even amend the charge to one under s 12(2) and punishable under s 12(3) of the Act. However, having regard to the circumstances of the case, the large quantity of suspected drug exhibits seized and the apparent concession of learned counsel for the accused persons in his submission that they were answerable for an offence but that the charge should be reduced to one of lesser severity from that which they faced under s 39B of the Act, the court was of the view that the interests of justice would best be served by reducing the charge to one punishable under s 39A(2) of the Act, even though it was equally open to the court to reduce it to one punishable under s 12(3) of the Act, the court being unable to arrive at a proper quantification of the heroin based on the evidence of the chemist.
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> In the present case, the chemist did not only *not* say what was the weight of the sample he took from each bulk, but he did not also say what was the weight of the sample that he took from the sample, for the purpose of carrying out the gas chromatography test which enabled him to determine the quantity of heroin in the bulk. Again, although the chemist referred to arriving at a percentage in general terms, he did not specify what was the percentage of heroin in the sample upon which the test was carried out so as to arrive at the quantity of heroin in the bulk.

He had then cited the Singapore case of *PP v Ang Soon Huat* [1991] 1 MLJ 1 and had gone on to say:

> The court in the present case was in a similar predicament as it was not able to know whether the bulk of the suspected drug exhibits had been homogenized to ensure that the sample taken from the sample for the gas

chromatography test was indeed representative of the whole, ie the bulk. Hence, parts of the judgment in *Ang Soon Huat* have been given emphasis above to show the similarities in the methodology adopted for quantitative analysis of the heroin in that case as compared with the present case.

The learned deputy public prosecutor made a valiant attempt to equate the methodology adopted in the present case with that described in the High Court decision in *PP v Roslim bin Harun* [1993] 3 CLJ 505 and approved by the Supreme Court in *Roslim bin Harun v PP* [1994] 2 CLJ 486.

With respect, the court was unable to agree with him. In *Roslim bin Harun*, the subject matter of the charge was cannabis, which is a plant material. There, the chemist examined physically and microscopically every roll of the 2,700 rolls of the plant material and found them to be of the genus cannabis. This was confirmed upon qualitative chemical tests carried out on random representative samples. However, cannabis in this form is quite different from heroin in granular or powder form where there would be impurities in the bulk as well as in the sample taken from the bulk.

In the present case, the qualitative analysis carried out to conclude that the suspected drug exhibits contained heroin was not disputed. What was in issue was the quantity of heroin involved. For example, the contents of the three basins seized from the apartment each weighed 2,655.0gm, 2697.7gm and 2691.7gm whereas, even according to the chemist with his questionable methodology adopted to attain homogeneity of the bulk, the heroin content of the bulk in those three basins was 186.0gm, 166.3gm and 131.5gm respectively. This clearly showed that the heroin content comprised in the bulk in each basin was well below 10% which meant that more than 90% of the contents contained impurities. However, this conclusion of the heroin content was suspect because of the infirmity in the methodology adopted to homogenize the bulk before taking samples therefrom.

In the light of this patent weakness in the case for the prosecution, the court was constrained to give the benefit of the doubt to the defence and it therefore reduced the charge accordingly.

In the light of these findings, we were mystified by the rejection of the chemist's evidence by the learned trial judge and could not agree with him that the chemist had not complied with the provisions of the Act in conducting the chemical analysis on the drugs recovered.

In a similar situation, the Supreme Court in *PP v Lam San* [1991] 3 MLJ 426 held:

(1) In regard to the evidence of the chemist, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. As long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory. The evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence had been successfully proved.

(2) The doubt entertained by the learned judge in this case was not arrived at on reasonable or rational grounds and the test he applied to the evidence of the chemist on the question of the weight of the drugs was a misdirection.

(3) The appeal should be allowed and the case remitted to the learned judge to call for the defence.

A We, therefore, ruled that the learned trial judge was in error here especially when he had specified the same amount of drugs in the amended charge as that appearing in the original charge, and after having concluded that the prosecution's case was overwhelming and that the drug involved, pursuant to the chemical analysis, was heroin.

B We had allowed the appeal and directed that the defence of both respondents be called by the same trial judge on the original charge and to be disposed of within three months from that order. Since the second respondent has already completed his imprisonment term, we directed the prosecution to take action, as regards the order of committal against him, for the purpose of the continued hearing.

C It is relevant for us to state another point raised by learned counsel for the respondents and that is whether the prosecution can appeal against conviction in a matter where the respondents had pleaded guilty to an amended charge in which case the appeal should only be against sentence as provided for under s 305 of the Criminal Procedure Code (FMS Cap 6)
D ('the CPC') which reads:

> When an accused person has pleaded guilty and been convicted by a Magistrate on such plea, there shall be no appeal except as to the extent or legality of the sentence.

This, however, in view of s 303A of the CPC as well, only applies to
E proceedings in a sessions court and a magistrate's court.

Section 50 of the Courts of Judicature Act 1964 states that we have jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original jurisdiction and in the exercise of its appellate or revisionary jurisdiction in respect of any criminal
F matter decided by the sessions court and 'decision' under s 3 of that Act includes a judgment, sentence or order.

At first blush, we were quite taken up by what we considered was a novel point but upon reading the relevant provisions, we found the argument totally devoid of merit as the decision appealed against was actually the
G reduction of the charge which certainly was an order, which is appealable, and the plea of guilty by both the respondents to the reduced charge was only a consequence of that order.

Order accordingly.

H Reported by Jafisah Jaafar

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